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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN E. WILLIAMS, *Petitioner,*

v.

STATE OF GEORGIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI OF THE COURT OF APPEALS OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED FOR REVIEW

I.

In view of the modern concept of privacy as explicated in *Katz* v. *United States,* 389 U.S. 347 (1967), and its progency, what, if any viability remains of the "open field" doctrine spawned by *Hester* v. *United States,* 265 U.S. 57 (1924)?

II.

Where an individual purposefully excludes others by fencing and posting his property and locking entrances, does he thereby create a reasonable expectation of privacy which law enforcement officers must respect, even though the area has traditionally been considered an "open field?"[1]

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[1] This case is a companion to *Pianka* v. *Georgia,* #80-1889, and *Davis* v. *Georgia,* #80-__ ____, both previously docketed in this Court.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
PROCEDURAL HISTORY	2
THE FACTS	3
REASONS FOR GRANTING THE WRIT	4
A. The Decision Below Conflicts With The Rationale Of Previous Decisions Of This Court	4
B. The Decision Below Is In Conflict With Other Federal And State Court Decisions	6
CONCLUSION	7
APPENDIX A	1a

TABLE OF AUTHORITIES

CASES:	PAGE
Air Pollution Variance Board v. *Western Alfalfa*, 416 U.S. 861 (1974)	6
Arkansas v. *Sanders*, 99 S, Ct, 2586 (1979)	5
Conrad v. *State*, 63 Wis. 2d 616, 218 N.W. 2d 252 (1974)	6
Davis v. *Georgia*, _____ U.S. _____ #80 _____ (1981)	i
G.M. Leasing v. *United States*, 429 U.S. 338 (1978)	6
Hester v. *United States*, 265 U.S. 57 (1924)	*passim*
Katz v. *United States*, 389 U.S. 347 (1967)	*passim*
Nathanson v. *State*, 554 P. 2d 456 (Alaska 1976)	6
Norman v. *State*, 379 So. 2d 643, 647 (Fla. S.Ct.1980)	6
People v. *McClaugherty*, 566 P.2d 361, 362 (S.Ct. Colo. 1977)	6
Pianka v. *Georgia*, _____ U.S. _____, #80 _____1889 (1981)	i
Rakas v. *Illinois*, 439 U.S. 128 (1979)	5
State v. *Wert*, 550 S.W. 2d 616, 218 N.W. 2d 252 (1974)	6
United States v. *Chadwick*, 433 U.S.1 (1977)	5
United States v. *Freie*, 545 F2d 1217 (9th Cir. 1976)	6
United States v. *Santana*, 427 U.S. 38 (1976)	6

CONSTITUTIONAL PROVISIONS:

United Constitution, Amendment IV	2
United States Constitution, Amendment XIV	2

Table of Authorities Continued

STATUTES:	PAGE
28 United States Code §1257 (3)	2

OTHER:

W. LaFave, SEARCH AND SEIZURE §2.4 P. 333 (1980) ...	6

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NORMAN E. WILLIAMS, *Petitioner,*

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STATE OF GEORGIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI OF THE COURT OF APPEALS OF THE STATE OF GEORGIA

Petitioner, NORMAN E. WILLIAMS, respectfully prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of Georgia entered on January 28, 1981.

OPINIONS BELOW

The Supreme Court of Georgia denied Petitioner's Application for Writ of Certiorari on March 4, 1981. The opinion of the Georgia Court of Appeals affirming Williams' conviction, Appendix A, attached hereto, is as yet unreported.

JURISDICTION

This Court's jurisdiction is invoked under 28 U. S. C. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Consitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment Fourteen, in pertinent part, provides:

> ". . . nor shall any State deprive any person of liberty. . . without due process of law. . . ."

PROCEDURAL HISTORY

On April 5th, 1979, Norman E. Williams was indicted along with 3 others in Tattnall County, Superior Court, Georgia for possession of marijuana.

A lengthy evidentiary hearing was conducted on his Motion to Suppress evidence gathered during a warrantless search and seizure. The Motion was overruled on April 17, 1979.

A bench trial was conducted upon a stipulation preserving the questions raised on the Motion to Suppress. Williams was found guilty and sentenced to ten (10) years imprisonment, five (5) of which were to be probated upon a payment of a $25,000.00 fine. The Georgia Court of Appeals affirmed on January 28th,

1981, basing its decision squarely on the "open field" doctrine of *Hester* v. *United States,* 265 U.S. 57 (1924). Williams' petition for a Writ of Certiorari was summarily denied by the Supreme Court of Georgia in an unpublished order.

THE FACTS

In 1978, Williams bought a large tract of farm land in an isolated area of Tattnall County, Georgia. He enclosed the entire area with fencing, gates, and locks, and prominently posted No Trespassing signs. Neighbors were told that hunting would not be permitted on the tract.

Air strips were indigenous to farms in the area, and Williams' farm was no exception. The strip was located near Williams' mobile home which, in turn, was surrounded by a heavily wooded area bearing year-round foliage.

The purchase of so large a tract by a relatively young man aroused some talk and suspicion. As a result, local, state and federal law-enforcement officials conducted "non-routine", i.e., trespassory, checks on the farm for about three months and found nothing.

On February 16th, 1979, a Georgia Bureau of Investigation agent received a phone call in which he was informed that there was "some activity" around Williams' farm, that a plane was flying over or had landed on the farm_____nothing else. The agent (Butler) hopped into a law enforcement plane piloted by one Little and, at an altitude between 500 and 800 feet and a speed of 80-100 miles circled the farm a couple of times. For a brief moment they spotted a plane and a truck near the mobile home. Because the sky was over-

cast, they lost sight of the truck and plane. When visibility returned, both the plane and truck were gone.

As they kept circling, they spotted the truck unloading what they "suspected" was marijuana.

Based on these observations, they directed other law enforcement officers to enter the premises. The gate being locked, they shot the lock off and, after traveling about one-quarter of a mile towards the mobile home, they arrested Williams in his vehicle. They then proceeded towards where they had seen the truck and, after searching an area 2-3 hundred feet from the truck, they found bales of marijuana covered with burlap and plastic.

After everyone was arrested and Williams' mobile home "secured," the officers continued searching and found other bales of marijuana.

All these searches were warrantless.

Several hours later a warrant to search the mobile home was obtained.

A rental car belonging to Williams' girl-friend (Moore) was taken to the jail by the Sheriff for "safe-keeping." When he opened the trunk, he discovered several bales of marijuana.[2]

REASONS FOR GRANTING THE WRIT.

A. The Decision Below Conflicts With The Rationale Of Previous Decisions Of This Court.

The decision below held, in effect, that all areas not immediately contiguous to ones dwelling are excluded, per se, from the Fourth Amendment's protection. In an

[2] Her conviction was reversed by the Georgia Court of Appeals.

agrarian state, this augurs baneful consequences and appears to be completely antagonistic to the rationale of prior decisions of this Court, including *Katz* v. *United States,* 389 U.S. 347 (1967), *United States* v. *Chadwick,* 433 U.S.1 (1977), and *Rakas* v. *Illinois,* 439 U.S. 128 (1979).

The court below relied squarely on *Hester's* "open fields" doctrine, in which Justice Holmes, by recourse to Blackstone and *obiter dictum* held that the protection accorded by the Fourth Amendment does not extend to "open fields."

From 1924 until 1967, the doctrine was universally accepted without qualification ar analysis. Applying common law concepts of property, the courts distinguished between open fields, on the one hand, and the house and its curtilage, it was unprotected.

In 1967 this Court held that the Fourth Amendment protects people, not places. *Katz,* supra. Although both sides in *Katz* posited their positions in terms of "protected areas," this Court rejected that formulation of the issue, saying that "it deflects attention from the problem."

> "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

Katz at 351-52.

A similar rationale was applied by this Court in *United States* v. *Chadwick,* supra, and *Arkansas* v. *Sanders,* 99 S. Ct. 2586 (1979).

Moreover, the decision below even stretches *Hester* way beyond its limited beginnings. *Hester* did not deal with a fenced, posted, locked area but with an unfenced, unposted, open area, and may well be said to rest upon principles of abandonment rather than "open fields."

B. The Decision Below Is In Conflict With Other Federal And State Court Decisions.

The decision below is directly in conflict with other state and federal decisions which have held that *Hester* was substantially erroded by *Katz. People* v. *McClaugherty,* 566 P.2d 361, 362 (S. Ct. Colo. 1977); *Norman* v. *State,* 379 So.2d 643, 647 (Fla.S.Ct. 1980); *United States* v. *Freie,* 545 F.2d 1217 (9th Cir. 1976); *Conrad* v. *State,* 63 Wis. 2d 616, 218 N.W. 2d 252 (1974); *State* v. *Wert,* 550 S.W. 2d 1 (Tenn. Cr. App. 1977); *Nathanson* v. *State,* 554 P.2d 456 (Alaska 1976).

This not to suggest that Georgia stands alone. See generally, W. Lafave, SEARCH AND SEIZURE §2.4, p.333 (1980).

The confusion among the various courts has gone on apace without any real guidance from this Court. See *Air Pollution Variance Board* v. *Western Alfalfa,* 416 U.S. 861 (1974); *G. M. Leasing* v. *United States,* 429 U.S. 338, 352 (1978); *United States* v. *Santana,* 427 U.S. 38 (1976).

What is needed is for a balance to be struck between *Hester,* on the one hand, and *Katz* on the other. It is submitted that *Hester* was never intended to mean all land outside of a residence or its curtilage.

Even so, whatever *Hester's* rationale, it is obvious that a *per se* denial of Fourth Amendment protection to certain areas, as *Hester* has been construed to hold, has been redically undercut by *Katz.*

This case presents a straightforward and uncontradicted factual situation which gives this Court a good opportunity to resolve the conflict that has been created by state courts and courts of appeal attempting to resolve the apparent conflict between *Hester* and *Katz* in the application of the Fourth Amendment.

It's time to take a good, hard look at *Hester.*

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectively submitted,

/s/ HERBERT SHAFER
Herbert Shafer

/s/ BOBBY LEE COOK, SR.
Bobby Lee Cook, Sr.

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a true and correct copy of the within Petition for a Writ of Certiorari, by depositing a copy of same in the United States Mail, with sufficient postage thereon, addressed to:

Clerk
Georgia Court of Appeals
433 State Judicial Building
Atlanta, Georgia 30334

Dupont K. Cheney, Esq.
District Attorney
Atlantic Judicial Circuit
P.O. Box 653
Hinesville, Georgia 31313

This 20th of May, 1981.

/s/ HERBERT SHAFER
Herbert Shafer

APPENDIX

APPENDIX A

January 28, 1981

60871

WILLIAMS *et al.*

v.

THE STATE.

29-207

DEEN, *Presiding Judge.*

Williams, Pianka, Davis and Moore were convicted of felony possession of marijuana. We first discuss the motion to suppress of the first three defendants.

1. Pursuant to information received from U.S. Customs, the G. B. I. sent a surveillance plane over a large generally wooded area owned by Williams, having on it a trailer and airstrip, and partly fronting the banks of the Ohoopee River. The occupants saw an airplane on an airstrip near a trailer in the approximate center of the property, along with two trucks and other cars parked nearby. Under cloud cover the airplane vanished but one of the trucks was then seen in an open area near the river unloading objects which they rightly assumed to be bales of marijuana. They notified other peace officers who had arrived on the ground outside the fenced premises and these men immediately shot out the lock of a gate across the road, entered, and under radio guidance with the G. B. I., the airplane went directly to the unloading scene, arrested Pianka and Davis, and located 45 bales of marijuana under nearby vegetation at the side of the road. Then turning back toward the trailer they came upon Williams in a jeep who, when he saw them, attempted an unsuccessful evasive maneuver.

The defendants first contend that since the area was fenced by strands of barbed wire and locked gate across the road the officers on ground patrol had no right to enter and conduct the warrantless search; secondly, if the information they had be held to constitute probable cause, that information

itself was tainted as emanating from a surveillance airplane which violated their constitutional right to expectations of privacy.

The expectation of privacy defense is based on Katz v. United States, 389 U.S. 347 (88 SC 507, 19 LE2d 576) (1967) which it is urged has interred the open fields doctrine developed by Hester v. United States, 265 U. S. 57, 59 (44 SC 445, 68 LE 898) (1923) and its progeny. This conclusion is unsupported. Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corp., 416 U. S. 861 (94 SC 2114, 40 LE2d 607) (1974). *Reece* v. *State*, 152 Ga. App. 760 (264 SE2d 258) (1979). McDowell v. United States, 383 F2d 599 (1) (1967). Katz involved the reasonable expectations of privacy of one making a call from a telephone booth (which had been outfitted with electronic eavesdropping equipment) not to be overheard. This is a far cry from a visual sighting from an airplane which admittedly was flying at a lawful height over the premises. Visual surveillance from an airplane has been held not illegal (People v. Superior Court etc., 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1964) unless, as in People v. Sneed, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (1973), where the helicopter decended to an elevation of 25 feet or less and thus obviously intruded upon the peace and well being of persons on the ground. The mere fact, however, that the person observed has an expectation of privacy is not the whole story; if it were, every harborer of contraband would be entitled to immunity from observation because surely unless he expected to remain undiscovered he would not risk possession of property carrying a highly undesirable penalty. The expectation must be reasonable, and it is no more unreasonable to expect an airplane to fly over a farm or wooded area at a legal distance from the ground as provided by federal regulations than to expect a passerby, whether he be a police officer or not, to look past the strand of barbed wire separating an open field from a highway and, if he sees an illegal activity in progress, to enter the property for the purpose of arresting the the protagonists. The sky, like the road, is a highway over

which those licensed to do so may pass so long as they keep a proper vertical distance between their craft and the property of others. The fact that the information for the defendants' activities was obtained in this manner does not render it unuseable.

2. There were two occupants in the airplane which, after flying over the area, landed on the airstrip and met the sheriff and his party. The latter, following directions, had proceeded to the river area and arrested the defendants Pianka and Davis in the truck and later stopped and arrested Williams in the jeep. The testimony clearly establishes that the ground party was too small to contain the premises without entry, that it took over three hours to return to town and obtain a search warrant (which was done for the examination of the trailer), and that the report of Little in the plane of the activities of the defendants and the resemblance of the observed objects to bales of marijuana, combined with previous information regarding suspected activities at that location all combined to establish probable cause to believe a felony was in progress together with exigent circumstances making immediate action necessary. "When a police officer is the informant the reliability of the informant is presumed as a matter of law." *Quinn* v. *State*, 132 Ga. App. 395, 396 (1) (208 SE2d 263) (1974). Where there is communication between the two, probable cause can rest upon the collective knowledge of the various peace officers involved. *Perryman* v. *State*, 149 Ga. App. 54, 56 (3) (253 SE2d 444) (1979). "The exigencies of time and the possible removal of the contraband to another state created an emergency — an 'exigent circumstance.' United States v. Rabinowitz, 339 U. S. 56 (70 SC 430, 94 LE 653) (1950)." *Andreu* v. *State of Ga.*, 124 Ga. App. 793, 797 (186 SE2d 137) (1971). A later trespass does not render inadmissible in evidence knowledge legally obtained. Hester v. United States, 265 U.S. 57, *supra*, and see *Patterson* v. *State*, 133 Ga. App. 742 (4) (212 SE2d 858) (1976), a case in which Justice, then Judge Marshall approved Mr. Justice Harlan's concurring opinion in Katz which limns the

contrasting natures of an open field and a telephone booth where search and seizure are involved. *Id.*, p. 747.

The law enforcement officers involved had probable cause to enter the Williams property and arrest both the defendants found in the truck and Williams himself, as he apparently attempted to turn away from them in the jeep and re-enter the woods. In the latest case on this subject, *Giddens* v. *State* (case no. 60223, decided Oct. 10, 1980), this court reiterated its adherence to the open field doctrine enunciated in Hester v. United states, 265 U. S. 57, supra, but drew a distinction between a non-dwelling structure and one which might be used as a dwelling place, as was the tent in *Kelley* v. *State*, 146 Ga. App. 179 (245 SE2d 872) (1978). Since it fell in the latter category the officers very properly refused to search the trailer until after the search warrant had been obtained. The motion to suppress was properly denied and the convictions of Williams, Davis and Pianka are without error.

3. The conviction of Marion Moore, however, rests on a different basis. While the cache of marijuana was being retrieved, certain officers returned to town to make affidavit and obtain a search warrant for the trailer. They returned to the farm with this instrument and searched the trailer (from which they had already removed the defendant Marion Moore and placed her under arrest, but without making a further search), later submitting an inventory of items removed from the structure under the search warrant which included the keys to a Ford Thunderbird, one of two rental cars parked outside. This car was driven to town with the intention of returning it to the lessors, but on alighting the police officer unlocked and inspected the trunk of the vehicle and found another bale of marijuana therein.

Although the officers knew at the time they obtained the warrant that various automobiles were parked in close vicinity to the trailer, the warrant asked only permission to search the trailer itself, not the yard or premises or vehicles or any other object in its vicinity. We are constrained to hold that

testimony concerning the bale of marijuana found in defendant Moore's automobile was therefore erroneously admitted in evidence. The universally recognized rule is that a search without a warrant is per se unreasonable unless it falls within certain clearly defined exceptions. Schneckloth v. Bustamonte, 412 U. S. 218 (93 SC 2041, 36 LE2d 854) (1973). *Bunn* v. *State*, 153 Ga. App. 270, 272 (265 SE2d 88) (1980). On occasion where one, in the course of an intrusion for which a prior justification exists comes inadventently upon a piece of incriminating evidence, such evidence is admissible on the basis that no infraction of Fourth Amendment rights was intended. Coolidge v. New Hampshire, 403 U. S. 443 (91 SC 2022, 29 LE2d 564) (1971). The discovery of the bale of marijuana in the trunk of the automobile leased by Ms. Moore is attempted to be justified by means of testimony of the officer involved that he did not intend to search the car, that his removing the keys from the ignition switch, carrying them around to the back of the vehicle and proceeding to unlock and open the trunk was an inadvertent act, and that after the trunk was opened the contraband was in plain view. The act may have been "inadvertent" in the sense that it was normal or habitual or even that it was the result of ordinary curiosity, but none of these motives would render proper an act otherwise a violation of Constitutional requirements.

It is also argued that the right to search the car trunk was permissible because the bailee, Ms. Moore, had been placed under arrest when she emerged from the trailer prior to the obtention of the search warrant and the vehicle might have been searched at that time, in which case the fact that it was first moved to another location would not render the search impermissible. *Glover* v. *State*, 139 Ga. App. 162 (227 SE2d 921) (1976). However, this only obtains when the arrest is lawful. No grounds for this defendant's arrest were known at the time it was made. Cf. Beck v. Ohio, 379 U. S. 89, 91 (85 SC 223, 13 LE2d 142) (1974). The only fact known about her at that time was that she was in propinquity with others who were engaged in transferring contraband at a position on the

premises about a half mile away. Mere propinquity does not without more justify either arrest or search. Sibron v. New York, 392 U. S. 40, 62-63 (88 SC 1889, 20 LE2d 917) (1968); Ybarra v. Illinois, _____ U. S. _____ (100 SC _____, 62 LE2d 238) (1979). Nor does an arrest alone give rise to the right to search a vehicle parked on the premises. *Buday* v. *State*, 150 Ga. App. 686 (258 SE2d 318) (1979).

Nor does it appear that the car was being impounded for which reason an inventory search might have been necessary. Cf. *Dunkum* v. *State*, 138 Ga. App. 321 (226 SE2d 133) (1976). Where it is clear that police officers are conducting a warrantless investigatory search without probable cause under the guise of an inventory search, we should "refuse to allow such apparent subterfuges to erode the strictures of the fourth amendment." *Gaston* v. *State*, 155 Ga. App. 337, 339 (270 SE2d 877) (1980). The same is true of an "impulse" search which is not, at the time it occurs, a proper caretaking function of the police. *State* v. *McCranie*, 137 Ga. App. 369, 370 (223 SE2d 765) (1976). The marijuana found in the Ford Thunderbird was improperly admitted in evidence against the defendant Moore, and her conviction must accordingly be reversed.

Judgment affirmed in part and reversed in part. Birdsong and Sognier, JJ., concur.